Indiana Board of Special Education Appeals

Room 229, State House - Indianapolis, IN 46204-2798
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BEFORE THE INDIANA BOARD
OF SPECIAL EDUCATION APPEALS

In the Matter of M.O.,	**)**	
Duneland School Corporation, and	**)**	
Porter County Education Services	**)**	**ART. 7 HEARING NO. 1608.07**
	)	**HR 128-2007**
Appeal from the Decision of:	**)**	
Joseph R. McKinney, J.D., Ed.D.,	**)**	
Independent Hearing Officer	**)**	

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, WITH ORDERS

Procedural History

M.O., a high school student in the tenth grade (D/O/B 08/05/91), by his Parent, acting *pro se*, requested on September 29, 2006, a due process hearing against the Duneland School Corporation and the Porter County Education Services interlocal (collectively, the "School"). At the time, the Parent represented the Student had been diagnosed with depressive disorder and oppositional defiant disorder. The two primary issues raised were the appropriate identification and eligibility of the student and the denial of a free appropriate public education (FAPE). The Student had not previously been identified as in need of special education and related services under 511 IAC 7-17 *et seq.* ("Article 7"). The Student had been subjected to a disciplinary change of placement following an altercation in the high school. The Parent requested an expedited hearing.

Joseph R. McKinney, J.D., Ed.D., was appointed that same date as the Independent Hearing Officer (IHO). He was advised in his appointment letter that this was to be an expedited hearing. The IHO was specifically advised that "[e]xtensions of time are not permitted in an expedited due process hearing." The IHO's written decision was due on October 12, 2006, pursuant to the timeline for expedited hearings under 511 IAC 7-30-5.

The IHO conducted a pre-hearing conference and issued a pre-hearing order on October 3, 2006. The IHO specified the issues for the expedited hearing and set October 5, 2006, as the hearing date.

Later that same date, the Parent's counsel filed an amended request for an expedited due process hearing, adding issues not contained in the pre-hearing order issued earlier that date. The IHO treated these additional issues as non-expedited ones.

An evidentiary hearing was conducted on October 5, 2006, on the following issue: Whether the School knew or should have known at the time the Student engaged in behavior that violated the rules of the School that the Student was a Student with a disability before the behavior that precipitated the disciplinary action occurred. See 511 IAC 7-29-8 (protections for students not yet eligible for special education and related services).

On October 9, 2006, the IHO issued an Interim Order, finding that the School knew or should have known the Student had a disability. The IHO ordered the School to commence homebound services, which would include psychological counseling. Homebound services would be provided three times a week for periods of two and one-half hours each. The services were to continue during the pendency of the proceedings unless modified by the IHO.

The IHO issued his written decision on October 12, 2006. The IHO determined twenty-eight (28) Findings of Fact, one (1) Conclusion of Law, and four (4) Orders. The written decision, in relevant part, reads as follows:

FINDINGS OF FACT

. . .

3. The Student is 15 years old; he was born on August 5, 1991. He weighs approximately 120 pounds and is 5'9" tall.
4. The Student transferred to Chesterton High School for the 10th grade on August 24, 2006.
5. On August 24, 2006, the Mother of the Student went to Chesterton High School to enroll the Student and his brother.
6. On August 24, 2006, the Mother of the Student met with the Chesterton High School school counselor, Mr. Swanson.
7. The Mother of the Student, while meeting with Mr. Swanson, filled out the School's enrollment form (on 8-24-06).
8. The Mother expressed in writing that the Student had a disorder, "depression" on the enrollment form (on 8-24-06).
9. The Mother expressed in writing on the enrollment form that the Student took the medication Wellbutrin daily for depression (on 8-24-06).
10. During the enrollment meeting for the Student, Mr. Swanson, the school counselor, was made aware that the Student had academically performed very poorly the previous year at Penn High School (on 8-24-06). Mr. Swanson had the responsibility of "building a schedule" for the Student.
11. Mr. Swanson remembered looking at a report card or transcript or other written document concerning the Student's grades and credit hours earned during 9th grade at Penn High School. The grade report indicated that the Student had earned some F's and was very "behind on credits."
12. Mr. Swanson inquired about the lack of credits and poor grades. The Mother told Mr. Swanson that the Student was "being treated for depression and ODD." She also told Mr. Swanson that the Student had seen a psychiatrist for two (2) years for his disorders.
13. After Mr. Swanson developed a schedule for the Student, the Mother asked if he could schedule a meeting for her to meet with the Student's teachers so she could explain his

"disorder" and what his previous school had done with respect to his condition. Mr. Swanson explained he could not set up such a meeting because of privacy laws, and HIPAA[1] laws, and he also needed the Student's file, and medical releases.

14. Mr. Swanson was asked at the hearing (Transcript, p. 128) what he does with the information when a parent indicates that a student is being treated for a disorder such as depression. Mr. Swanson replied, that he does nothing with information about a disorder such as depression "when a parent indicates the student is in counseling, no."
15. Immediately following this question, Mr. Swanson said he had never received any "inservice training in the area of identification of children with disabilities." Later, answering the School attorney's question about his answer to this question about inservice, he indicated he was confused when he answered the question and thought it dealt with the evaluation of children with disabilities.
16. The School had in its possession on or before August 28, 2006, the Student's transcript which indicated that the Student earned only 8 and one-half credits his freshman year. It also indicated very low grades, many F's and D's. The Student's class rank was 711/753 and his cumulative GPA was 0.7692.
17. On August 28, 2006 the Mother expressed in writing (she sent an e-mail) to Mr. Swanson that she was very concerned about the Student going to his math class the next day because he had told her that a male student "had started" with him on Friday. (Chesterton High School has block scheduling.) She also said she had trouble getting her son out of bed, and motivated to go to school.
18. The Mother indicated in the e-mail that she did not "want trouble so early in the year."
19. The Mother wrote that the Student "Keeps to himself; however, he is being treated for depression and Oppositional Defiant Disorder and he does have a shorter fuse than most."
20. Mr. Swanson sent a message (by phone) to the math teacher to "Keep an eye on the situation." Mr. Swanson did not call the Mother to discuss the situation.
21. On September 12, 2006 the Student was officially found to be truant (put in his record) for skipping a class.
22. On September 13, 2006 the Student was officially (put in his record) found to have been insubordinate for not doing "two homeworks in a row." He served detention for this behavior.
23. On September 19, 2006 the Student got into a physical fight with another Student. While some of the facts are in dispute, it is factual that the other boy hit the Student in the back of the head with a book, and then the Student hit the other student multiple times and tried to choke him and, as his teacher said, the Student was "out of control."
24. The Student had to be physically pulled off the other student and was escorted down the hall to the assistant principal's office. On the way to the office the Student punched a fire extinguisher and told the teacher escorting him to the office (not his classroom student) to "fuck you." The Student gave the assistant principal's secretary the middle finger. The Student continued to be disrespectful and continued to use profanity.
25. The High School principal tried to calm down the Student but the Student kept saying "fuck you." At one point the Student saw the student he had been fighting, and the Student ran out of the assistant principal's office apparently to fight again, but the principal stepped between the two and avoided another physical confrontation.

[1] Health Insurance Portability Accountability Act of 1996.

26. A few minutes later and back in the assistant principal's office, Mr. Longacre (one of the assistant principals) tried to calm the Student down, and find out what had happened between the Student and the other boy. The Student replied that "I'm going to fucking kill him" more than once to Mr. Longacre, referring to the boy he had been fighting.
27. The Student was suspended from school and a recommendation was made to expel him from school until June 8, 2007.
28. The Parent of the Student requested an evaluation of the Student as a child with an emotional disability on September 27, 2006.

CONCLUSION OF LAW

511 IAC 7-29-8, titled "Protections for children not yet eligible for special education and related services," states in pertinent part:

A student who has not been determined eligible for special education and related services under this article and who has engaged in behavior that violated any rule or code of conduct of the public agency, including any behavior described in this rule, may assert any of the protections provided for in this article if the public agency had knowledge, as described in subsection (b), that the student was a student with a disability before the behavior that precipitated the disciplinary action occurred.

(b) a public agency shall be deemed to have knowledge that a student is a student with a disability if any of the following have occurred:

1. A parent has expressed concern in writing…to certified personnel of the public agency that the student is in need of special education and related services…

In this case the Mother of the Student expressed in writing to certified personnel (includes school counselors) of the School before the behavior incident on September 19, 2006:

1. The Student suffers from depression.
2. The Student takes medication for depression.
3. The Student has been diagnosed with Oppositional Defiant Disorder (ODD).
4. The Student has a temper worse than most people.
5. The Student was being treated for depression.

The Mother also discussed all of these matters with the school counselor, and asked for a meeting with his teachers.

The School (Mr. Swanson) also had written documentation (and oral confirmation) that the Student had earned few credits last year and made terrible grades.

Unquestionably, the school counselor, Mr. Swanson had more than enough written information from the Mother to understand that she thought her son had a disability and was in need of special education services.

Mr. Swanson had knowledge the Student had a disability but did nothing with that information because as he said, the Student was in counseling. The Student should have been referred by Mr. Swanson for an evaluation pursuant to 511 IAC 7-25-4.

The IHO finds the School did have knowledge of the Student's disability pursuant to 511 IAC 7-29-8.

ORDERS

Pursuant to the Interim Order [of October 9, 2006], the School made arrangements for homebound services beginning on October 11, 2006.

It is hereby ORDERED that the School shall:

1. Provide the Student homebound services in his content areas. The Student shall meet with his teacher in each area for a period of 2 ½ hrs. The teacher does not need to be a licensed special education teacher or E.D. teacher.

2. The School shall provide one (1) hour of psychological counseling per week concentrating on behavioral control issues.

3. The School shall provide transportation for the Student to and from the location where the homebound services will be provided. This is a legal duty under Article 7.

4. The Student shall receive homebound services as set forth herein during the pendency of the Article 7 hearing (other issues are pending and dates have been set for a hearing on these issues).

The IHO provided an appeal statement, advising the parties of their right to an expedited appeal, as provided by 511 IAC 7-30-5. Thereafter, the IHO decided to treat the expedited hearing decision as an "interim hearing decision" and the orders as "interim orders." Still later, when he issued his final written decision (see *infra*), the IHO referred to the decision of October 12, 2006, as an "expedited interim order." Neither party appealed.

The School initiated homebound services. It also evaluated the Student. A Case Conference Committee (CCC) convened on October 20, 2006, and determined the Student was eligible for services as a Student with an emotional disability. See 511 IAC 7-26-6. There were no disputes as to the adequacy of the School's evaluation or the eligibility determination by the CCC.

The IHO bifurcated the expedited issue from the non-expedited issues. The parties originally agreed to additional hearing dates of November 21 and 22, 2006, as well as December 12 and 13, 2006, to address the additional issues raised by the Parents. On November 4, the School raised two additional issues: (1) Whether the School's proposed Individualized Education Program (IEP) was appropriate for the Student; and (2) What would be the "least restrictive environment" (LRE) for the Student.

On November 17, 2006, the IHO conducted a status conference. At this status conference, the Parents, by counsel, requested a continuance of the November hearing dates so that they could obtain an independent neuropsychological evaluation. The School objected to the continuance. The Parents reduced the request for a continuance to a writing that was sent to the IHO and opposing counsel on November 17, 2006. The request for a continuance of the November hearing dates reiterates that the extension of time is needed to obtain an independent neuropsychological evaluation. The Parents expressed no disagreement or dissatisfaction with the School's evaluation.

On November 22, 2006, the IHO issued an Order, granting the Parents' request for an extension of time. The hearing dates for November were vacated. The remaining hearing dates were December 12 and 13, 2006, and January 26 and 30, 2007. The following non-expedited issues would be addressed at the hearing:

1. Whether the School's proposed IEP is appropriate for the Student.

2. What is the appropriate placement for the Student?

3. As a result of the school's failure to timely evaluate and timely identify the Student as eligible for special education and related services, did the School deny to the Student his right to a Free Appropriate Public Education (FAPE) in the following ways:

a. Failure to devise IEPs to address the Student's academic, social, emotional, social skills and anger/anxiety issues.
b. Failure to devise IEPs that contained appropriate accommodations and modifications.
c. Failure to provide an FBA/BIP.
d. Failure to prevent discipline of the Student for manifestations of his disabilities, including the pending expulsions proceedings, without benefit of the notice and procedures contained in Article 7.

4. Whether the Student's family should be reimbursed for the independent educational evaluation they are seeking due to the School's failure to evaluate the Student.

5. Whether the documents related to the Student's threatened expulsion should be expunged from his records.

6. Whether the Student is entitled to compensatory educational services.

The Parents, by counsel, on November 17, 2006, also responded to the School's request to add two issues. In this pleading, the Parents indicate they are seeking reimbursement for the "independent educational evaluation" (IEE) they will obtain "due to the school's failure to evaluate the student." The Parents did not express any objection or disagreement with the evaluation that was conducted by the School and considered at the CCC meeting of October 20, 2006. The Parents also raised additional issues, including a "motion to strike" the IEP proposed by the School or to characterize the proposed IEP as an offer by the School to have judgment entered against it.

The School, on November 28, 2006, objected generally to this pleading and requested a pre-hearing conference to address the issues. On December 1, 2006, the School filed a more detailed response. The School denied the draft IEP was intended as a settlement offer and defended its position that the two additional issues were appropriate for this hearing. The School also filed a separate pleading styled as a "Motion In Limine," noting that the Student was to be evaluated by the neuropsychologist on December 8, 2006, but the hearing in this matter was set to begin four days later on December 12, 2006. The School would not have the opportunity to receive the evaluation report five (5) days prior to the beginning of the hearing, as required by 511 IAC 7-30-3(l)(8), which would be prejudicial to the School. The School moved that the

neuropsychologist's report and or testimony be stricken or, in the alternative, the IHO set new dates for the hearing so that the School would have the opportunity to review the evaluation results.

The Parents responded on December 2, 2006, noting that there are additional dates of January 26 and 30, 2007, and that the report will be available five days prior to the beginning of those dates.

Hearing was conducted on December 12 and 13, 2006. On January 3, 2007, the School sought and obtained from the IHO a subpoena to obtain records from the neuropsychologist. There was an apparent agreement between the parties that the neuropsychologist's report would be made available by January 15, 2007. However, Parents' counsel advised the IHO and the School's counsel on January 16, 2007, that the January 15, 2007, date could not be met because the neuropsychologist had not completed the report. The Parents acknowledged their responsibility to make available the report, but asserted the delay was not through any fault of theirs. The Parents suggested, *inter alia*, vacating the January 26, 2007, hearing date to allow time for the report to arrive and be shared timely before the January 30, 2007, hearing date. The Parents also suggested a pre-hearing conference be held to discuss these issues.

The neuropsychologist's report was never timely received. The last day of hearing was conducted on January 30, 2007. At the beginning of the hearing, the School objected to admission of any documents from the neuropsychologist because he was not going to be present to testify and, therefore, his documents standing alone constituted impermissible hearsay. The Parents argued that while this may be hearsay, the documents should be admitted. The Parents again admitted the documents were not timely shared with the School, and offered to continue the hearing in order to satisfy the five-day rule. The School also noted the neuropsychologist never complied with the original subpoena for certain records and moved that the evaluation belatedly supplied be stricken. The IHO overruled the objection and admitted the neuropsychologist's report into the record as Petitioners' Exhibits Nos. 58-62 (see Transcript, pp. 377-385). The neuropsychologist never testified. Testimony concluded that date. The IHO read to the parties the standard time frame for seeking administrative review by the Board of Special Education Appeals. (Tr., pp. 474-475). On February 5, 2007, the School's counsel tendered to the IHO records received from the neuropsychologist.

Although the IHO, in his Order of November 22, 2006, indicated a written decision would be issued by February 13, 2007, he failed to meet this deadline. On February 15, 2007, he contacted by email counsel for both parties, seeking one of them to request an extension of time. The Parents' counsel indicated, by email, that she would do so. The IHO treated the email as a written request for an extension of time and issued an Order on February 20, 2007, extending the date to February 23, 2007, for issuance of his final written decision. The IHO later contacted both counsel separately by telephone, seeking yet another extension of time in order to issue his written decision. These contacts occurred on February 23, 2007, the date the written decision was to be issued, per the IHO's most written Order. The School's counsel, that same dated, faxed a request for an extension of time to and including February 28, 2007. The IHO apparently granted the extension he sought although no Order to this effect is in the record. The IHO does not reference these subsequent extensions of time in his final written decision.

The IHO did issue his final written decision on February 26, 2007. He determined sixty-two (62) Findings of Fact, six (6) Conclusions of Law, and four (4) Orders. The decision, in relevant part, is reproduced below.

FINDINGS OF FACT

. . .

3. The Student is 15 ½ years old; he was born on August 5, 1991.

4. The Student transferred to Chesterton High School for the 10th grade on August 24, 2006.

5. On September 19, 2006 the Student was involved in a serious physical fight with another student.

6. While some of the facts about the fight were in dispute, the IHO found that the other boy hit the Student in the back of the head during class with a book, and then the Student hit the other student multiple times and tried to choke him, and his teacher said, the Student was "out of control" (see Interim Order dated October 12, 2006).

7. The Student had to be physically pulled off the other student by the classroom teacher. The teacher was injured during the struggle and the Student was escorted down a hall to the assistant principal's office.

8. On the way to the office the Student punched a fire extinguisher and told the teacher escorting him to the office (not his classroom teacher) to "fuck you." The Student gave the assistant principal's secretary the middle finger. The Student continued to be disrespectful and continued to use profanity.

9. The High School principal tried to calm the Student down, but the Student kept saying "fuck you." At one point the Student saw the boy he had been fighting, and the Student ran out of the assistant principal's office apparently to fight again, but the principal stepped between the two boys and avoided another physical confrontation.

10. A few minutes later and back in the assistant principal's office, the assistant principal tried to calm down the Student, and find out what had happened between the Student and the other boy. The Student replied that "I'm going to fucking kill him" more than once to the assistant principal, referring to the boy he had been fighting.

11. The Student was suspended from school for 10 school days, beginning September 20, 2006 pending expulsion from school until June 8, 2007.

12. On September 27, 2006 the Mother of the Student requested the School conduct an evaluation of the Student to determine whether he was a child with an emotional disability.

13. On September 29, 2006, the Parents filed for an Article 7 hearing to determine whether the School knew or should have known that the Student was a child with disability. A hearing was held on October 5, 2006.

14. The IHO in this matter issued a decision and interim orders finding that the School knew or should have known that the Student should have been evaluated for special education services. (See Decision dated October 12, 2006 and incorporated herein.)

15. The School thereafter conducted a psychoeducational evaluation of the Student.

16. A CCC meeting was held on October 20, 2006 and the CCC found the Student eligible for special education services as a child with an emotional disability.

17. The Student's grades began to decline in 8th grade.

18. The Student attended Penn High School for ninth grade. The Student only earned 8.5 credits out of an attempted 13. His G.P.A. was 0.7692. His class rank was 711 out of 753 students.

19. During his 9th grade year at Penn High School, the Student passed both the English/Language Arts and the math portions of the 9th grade ISTEP. His score on the math portion of the test earned him a pass+ score.

20. Dr. Figueroa has been the Student's psychiatrist since February 1, 2005.

21. The Student's parents took the Student to visit Dr. Figueroa after a fighting incident at school (during 8th grade).

22. The Student in the eighth grade grabbed another boy by the neck bending it, and became deficient [sic] defiant toward the principal.

23. Dr. Figueroa diagnosed the Student as follows: Axis I: Major Depressive Disorder; Axis IV: Problems related to interaction with the social environment, Educational problems.

24. Dr. Figueroa reported the Student had been involved in multiple infractions in the school. He also reported on February 1, 2005 that the Student was easily irritated had been in fights with his brothers.

25. Dr. Figueroa prescribed Wellbutrin XL 150 mg. to stabilize the Student's mood.

26. Dr. Figueroa has seen the Student several times and continues to see him. He has changed the Student's medication several times.

27. On September 25, 2006, Dr. Figueroa wrote the School and indicated that the Student's depressive disorder had been aggravated by his family move to a new location. The psychiatrist urged the School not to expel the Student because of his impulsive behavior.

28. The Student's parents took him to see Michael Reed, Ph.D., a clinical psychologist, after the February 2005 choking incident (See #22 above).

29. Dr. Reed diagnosed the Student with Oppositional Defiant Behavior.

30. The Student's parents met with Dr. Reed twice after the Student's visit for parenting techniques. Since the Student did not connect very well with Dr. Reed at the initial visit, he did not return until after the September 19, 2006 fighting incident.

31. On September 20, 2006 Dr. Reed diagnosed the Student with depression NOS and Oppositional Defiant Disorder. Dr. Reed has continued to treat the Student until present.

32. Dr. Reed reported the Student is angry every day and suffers from depression.

33. Dr. Reed does not believe the Student will be successful if placed back in the High School environment.

34. Dr. Reed is very concerned the Student will not be able to control his anger and could have another behavioral outburst. He also believes the Student has made academic progress with his current homebound arrangement and is concerned that it will not continue if the Student is placed back at the High School in the near future.

35. The Student has been described by his Parents as a "loner," although he has two friends from his previous school in South Bend and has two brothers at home.

36. The Student was independently evaluated by Dr. Hudson, a neuropsychologist, on December 15, 2006.

37. Dr. Hudson diagnosed the Student with Mood Disorder and Oppositional Defiant Disorder.

38. Dr. Hudson found the Student's behavioral problems, including aggression related to his mood disorder resulting in decreased ability to manage distress, poor interpersonal coping skills and diminished self-esteem.

39. Dr. Hudson concluded that until the Student's mood disorder is addressed that it would be extremely difficult if not impossible that the Student would be able to manage himself in the interpersonal environment of a high school.

40. Dr. Hudson recommended that the Student's current academic placement (homebound) is the most beneficial to him at this time. Dr. Hudson concluded that monitoring of the Student's mood disorder is crucial to determine if and when the Student's placement status should be modified.

41. The Parents of the Student are very concerned about the Student getting involved in another fighting incident if he were returned to the high school at this time.

42. The School fully evaluated the student in October, 2006. His WISC-IV full scale score was 106. His working memory, perceptual reasoning score, and processing speed were in the high average range.

43. The Student was administered the KTEA-II academic achievement test and his skills were generally average with his math computation skills measuring above average for his age.

44. The Student does not need remedial academic education. His academic problems stem from his lack of effort due to his depression.

45. The CCC met on October 20, 2006 to discuss the results of their evaluation with the Parents. This date had also been set as the "resolution meeting" date.

46. At the CCC, the School's educational diagnostician verbally reviewed the assessment team's reports with the Parents. She told the Parents that the evaluation team found the Student eligible for special education as a student with an emotional disability.

47. The educational diagnostician then went over proposed goals and objectives to be included in the Student's IEP.

48. The School went over a proposed Functional Behavior Assessment, and briefly discussed the incident that led to the Student's suspension from school. The special education director indicated the CCC knew it wanted the Student back at the High School.

49. The School discussed academic scheduling options with the Parents, and the principal reviewed the Student's credits with the Parents.

50. The Parents expressed their concerns about the Student being placed at the High School. The Parents indicated the Student was happy with his homebound instruction.

51. The School's IEP places the Student in a resource room with special education and related services provided outside the general education classroom during the instruction.

52. The Student would spend most of his week at school in the emotionally disabled class and with students who have an emotional disability.

53. The Parents told the CCC that the Student would feel "stereotyped" in classes composed of students with emotional disabilities.

54. The CCC did not discuss the potential harmful effects on the Student of the CCC's proposed placement, academic or self-esteem.

55. The IEP did not address the issue of discipline if the Student were to be physically aggressive, except that the Parents would be called. The IEP did not address multiple aggressive outbursts.

56. The Student has made substantial academic progress in his homebound placement compared to his 9th grade experience and the first few weeks of this year.

57. The School provides the homebound program for him at the alternative school location (not the High School). He does his work through computer programs.

58. The School does have an alternative education program called the A+ program for junior and senior students who have "credit deficiencies." The Students are also involved with various vocational programs outside of their 24-person classroom for part of the school day. Generally, the A+ program is not for special education students.

59. The director of the A+ program was chosen to supervise the Student's homebound program at the A+ location. She applied the A+ program rules to the Student, including the requirement of writing essays, and restrictions on self-pacing.

60. The Parents do not trust or believe the principal has been fair to them.

61. The Student has enrolled in the online Indiana University High School program.

62. The I.U. program is accredited by the North Central Association. It is a distance education independent study program which can lead to an IUHS diploma.

CONCLUSIONS OF LAW

1. The IHO reaffirms his interim order decision of October 12, 2006, which is fully incorporated herein by this reference.

2. The School's proposed IEP is not appropriate for the Student. The Student remains a danger to himself and others. The Student is not ready to return to school.

3. The appropriate placement for the Student is a homebound program not the placement proposed by the School. The School did not adequately consider the placement's harmful effects on the Student.

4. The Student had only attended School for a relatively short period of time, thus the only violation of FAPE for not timely referring the Student for a special education evaluation was:

Failure to prevent discipline of the Student for manifestations of his disabilities, including the pending expulsions proceedings, without benefit of the notice and procedures contained in Article 7.

5. The Student's family should be reimbursed for the independent education evaluation conducted by Dr. Hudson.

6. The Student is entitled to compensatory educational services; even the School admits to this in their IEP.

ORDERS

1. The School shall convene a case conference committee meeting and provide the Student with an IEP that continues his current homebound program except that the Student may proceed at his own pace through all of the subjects **or** if the parent chooses the CCC shall provide the Student with an IEP calling for a homebound placement but permitting the Student to take courses (School paying for them) through the IUHS program. This placement shall be treated the same as any other private school placement, including acceptance of course credits pursuant to the IEP.

With either option the School will make available the affective counseling services as set forth on the accommodations page of the IEP.

2. The School shall offer 16 hours of tutoring in academic classes as compensatory services, as set forth in the accommodations page of the IEP, except tutoring will be provided at the Student's home.

3. The School shall pay for the independent evaluation and mileage associated with it.

4. The School shall pay for the services of Dr. Reed for visits occurring after September 19, 2006 to present (and mileage).

The IHO provided an appeal statement; however, the appeal statement was for an expedited administrative appeal under 511 IAC 7-30-5. The advisement of rights was contrary to the appeal statement provided at the close of the hearing on January 30, 2007 (see *supra*).

APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

The School, by counsel, wrote the Board of Special Education Appeals (BSEA) on March 1, 2007, seeking clarification of its administrative appeal rights. Tendered with the letter was an expedited Petition for Review should the BSEA determine that this was an expedited proceeding.

The BSEA[2] requested and received a copy of the IHO's written decision of February 26, 2007. BSEA members conferred by telephone on March 2, 2007, and issued that same date a *per curiam* document entitled "Entries and Orders." In this document, the BSEA noted the history of the proceedings, adding that the expedited hearing decision of October 12, 2006, should have been a final and appealable decision. However, the IHO characterized the decision as "an interim hearing decision" and the order as an "interim order," designations that neither party objected to. The final written decision of the IHO could not have been an expedited decision. The passage of time (September 29, 2006, to February 26, 2007) along with the granting of extensions of time all militate against a finding that the final written decision was an expedited

[2] Dennis Graft, Esq., was appointed by the State Superintendent of Public Instruction to serve in the stead of BSEA member Raymond W. Quist, Ph.D., who could not participate in this matter due to illness.

one. Accordingly, the BSEA found the written decision was not an expedited one, and that the appeal deadline would be the standard 30-day time frame as provided by 511 IAC 7-30-3(x). The parties were advised of other requirements and rights accorded under the administrative appeal procedures. The parties were also advised the BSEA would conduct oral argument in this matter, as permitted by 511 IAC 7-30-4(k), (l).

On March 28, 2007, the School sought an extension of time to prepare and file its Petition for Review. The request was timely and the extension period minimal (one week from the due date). The Parents, by counsel, objected to the request, characterizing it as "a request for another extension of time." The BSEA granted the request by Order dated March 29, 2007, noting that this is the first request for an extension of time. The School was granted a one-week extension of time to file its Petition for Review. The Petition was due by the close of business April 6, 2007. The date by which the BSEA's final written decision must be issued was established as May 7, 2007.

School's Petition for Review

The School filed its Petition for Review[3] on April 6, 2007. The School objected to the following Findings of Fact: Nos. 23-26, 30-34, 36-40, 42, 43, 48, 52, 54-57, 59, and 62. The School also objected to Conclusions of Law Nos. 2, 3, and 5, as well as Orders Nos. 1-4.

Findings of Fact Nos. 23-26 are based on medical records from the Student's treating psychiatrist. The psychiatrist did not testify. Statements attributed to the psychiatrist were hearsay. The psychiatrist lacked personal knowledge for some of his statements. The School also argued that, under I.C. § 4-21.5-3-26(a), "[a] hearing officer may not base his findings solely on hearsay evidence."[4]

The School asserted that Finding of Fact No. 30 is not supported by the record and should be amended. Finding of Fact No. 31 mischaracterizes the Student's current diagnosis. Although the psychologist (Michael Reed, Ph.D., who testified by telephone) originally diagnosed the Student as having ODD, he later removed this diagnosis as the Student no longer exhibited such characteristics. (Tr., p. 281).

Finding of Fact No. 32 is not supported by the testimony of Dr. Reed, who stated the Student was controlling his anger (Tr. at pp. 254-55), adding that the Student is doing well at the time, including at home, and would not necessarily require weekly therapy (Tr., pp. 256, 264). Dr.

[3] The School refers to this document as its "Amended Petition for Review" because it had filed an expedited (and abbreviated) Petition for Review in the event the BSEA had determined the IHO's written decision of February 26, 2007, was an expedited hearing decision. As it was not so determined, the original Petition for Review was not considered. The parties had the standard 30-day time frame to prepare and file a Petition for Review. The BSEA considers this document to be the only Petition for Review.

[4] I.C. § 4-21.5-3-26(a) does not prohibit a hearing officer from making findings based on hearsay. The statute does proscribe a hearing officer or administrative law judge from issuing an order based solely on hearsay evidence that has been properly objected to. The statutory reference is to the Administrative Orders and Procedures Act, which apply to administrative proceedings such as these, except where inconsistent with the due process requirements of the Individuals with Disabilities Education Act and Article 7. See 511 IAC 7-30-3(p).

Reed did not testify the Student was angry every day. Testimony from the homebound teacher supported Dr. Reed's statements. (See testimony of Estelle Chaddock, Tr., pp. 334, 353-354.)

The School also takes exception to Finding of Fact No. 33, asserting that it is based on selective use of testimony, omitting relevant facts that would have indicated Dr. Reed relied upon parent input and did not review any school records, including any educational testing, and was not familiar with the requirements of Art. 7. He does not have expertise in making educational recommendations. (Tr., pp. 263, 293-294, 296-297, 307, 308-310).

Finding of Fact No. 34, the School states, is unsupported by the record and is arbitrary and capricious. Findings of Fact Nos. 36-40 are based solely on hearsay (the neuropsychologist's report) and are unsupported by substantial evidence in the record. The neuropsychologist did not testify and his report was submitted untimely. It was admitted over the objections of the School. It was error, the School represents, for the IHO to admit the document and to rely upon them.

The School also objects, in part, to Finding of Fact No. 42, representing that the Student's Perceptual Reasoning Index on the WISC-IV was in the average range rather than high average. (See Respondent's Exhibit No. 16 at p. 32.) The School also objects, in part, to Finding of Fact No. 43. The Student's scores on the KTEA-II were in the average range. (See R. Ex. No. 16, p. 34).

Finding of Fact No. 48, the School asserts, misrepresents the testimony of the district director of special education, and, as a consequence, is arbitrary and capricious. The School also objects to Finding of Fact No. 52, which contradicts the evidence submitted at the hearing. The School did not propose placement in an ED class. Rather, the School proposed enrollment in a self-improvement class, a team-taught English class, Student Resource Time (SRT), Independent Study Reading class, with certain electives. The proposed IEP also included weekly affective counseling services. (See Tr., pp. 40-45, 67, 88, 134, 425-426, 448; R. Ex. No. 16, pp. 59-60.)

The School takes exception to Finding of Fact No. 54, claiming the CCC did discuss the potential harmful effects of the proposed placement on the Student. The CCC did consider concerns expressed by the Parents, as evidence by the CCC report, and addressed these in the Behavioral Intervention Plan (BIP). A conditioning program was found not to be a good choice for the Student due to his potential resistance to such a program. (See Tr., pp. 127-130; R. Ex. 16, pp. 59, 64-67. The School asserts the IHO's factual determination is not supported by substantial evidence in the record.

In like manner, the School objects to Finding of Fact No. 55, stating that evidence in the record supports a contrary finding. The School also objects to the characterization that the Student had "multiple aggressive outbursts." He had three behavior incidents over the course of three years. (See Tr., pp. 115, 131-132, 230-231, 334, 354).

The School takes exception to Finding of Fact No. 56. The Student has not made "substantial academic progress." At the time of the issuance of the IHO's decision, the Student had completed only two of his four homebound courses. The Student has done as well in the

homebound placement as he did in a general education placement his freshman year when the Student had not been eligible for special education and related services.

Finding of Fact No. 57 is incorrect in part, the School argues. Part of the Student's work is performed via computer; part of it is not. Finding of Fact No. 59 mischaracterizes the evidence and, the School represents, is arbitrary and capricious. The A+ program is a curriculum, not a "rule." Students are required to complete an essay portion to earn credit. This is a part of the curriculum and not a "rule." (See Tr., pp. 321-326, 332, 340-341, 346).

Lastly, the School objects to Finding of Fact No. 62. The School objected to admission of documents regarding the online program; however, the IHO never ruled on the School's objection and never admitted the documents into the record. (See Tr., pp. 15-16).

The School's objections to the IHO's Conclusions of Law track its objections to the corresponding Findings of Fact. Conclusion of Law No. 2 is contradicted by the evidence in the record, the School states. The IEP developed at the October 20, 2006, CCC does offer the Student a FAPE. The Parents' concerns were considered. There were no procedural violations at the CCC meeting that prevented the Parents from meaningful participation or deprived the Student of any meaningful benefit. The Student's need for compensatory skills in the social-emotional arena are addressed in the BIP, as well as in the goals and objectives in the IEP generally.

The School also objects to Conclusion of Law No. 3, arguing the appropriate placement for the Student is not on homebound but in the educational placement proposed by the School. Substantial evidence in the record supports the School's placement. In addition, the School states, the homebound placement is not the LRE for this Student.

The School also challenges Conclusion of Law No. 5, arguing that the basis for awarding reimbursement for an IEE has not been established.

As for the IHO's Orders, the School objects to all four (4) Orders. Order No. 1 is based on Conclusions of Law Nos. 2 and 3, which the School has objected to (see *supra*). The School seeks amendment of Order No. 2 to permit tutoring of the Student within the School setting rather than in the home of the Student. Order No. 3, which is based on Conclusion of Law No. 5, is unsupported by the record. Lastly, Order No. 4 has lacks any basis. The services are medical in nature and bear no relationship to any educational service.

The School also objects to the IHO's refusal to admit Respondents' Exhibit No. 26, which consisted of records the School had obtained from psychologist Dr. Reed via subpoena. The School did not receive the records until the day of the hearing (January 30, 2007). School's counsel had already asked a series of questions based on these documents during cross-examination of Dr. Reed. It was at the close of the hearing that School's counsel realized the documents had not been admitted. At this point, she tendered the documents. The IHO did not admit them but indicated he would take the matter under advisement. (See Tr., pp. 478-479). The IHO, in his written decision of February 26, 2007, indicated he would not accept the School's exhibit "because the School's counsel did not offer it into evidence until after the close

of evidence and the hearing itself." (Hearing Decision, p. 7). The School argues that although it had the documents as of December 13, 2006, and that it had used the documents as part of the cross-examination of Dr. Reed, the documents should be "considered as rebuttal evidence with this context, and therefore admissible."

The School also claimed the IHO had a "potential conflict of interest" because he is employed by a university that sponsors charter schools, including virtual charter schools, and the online school addressed in the IHO's decision is similar to the virtual charter schools.

The Parents' Response to the Petition for Review

The Parents, by Counsel, filed their Response to the School's Petition for Review on April 16, 2007. The Parents argue that the School had the burden of proof on the two issues it raised (whether the IEP is appropriate; what is the LRE for the Student) but have failed to meet this burden. The Parents also object to the School's "attempt to raise new arguments or provide new evidence" upon administrative appeal. The Parents specifically object to the purported charter-school conflict of interest. The Parents also noted that there had been difficulties in resolving transportation issues with regard to the IHO's initial determination of October 12, 2006.[5]

The Parents sought to ensure the decision of October 12, 2006, was not reversed, arguing that it was not appealed as provided by the directions of the IHO at the conclusion of that decision. The Parents also represent that the School does not now disagree on the Student's need for an IEP, has agreed to halt expulsion proceedings, and has agreed to expunge the Student's records of references to the expulsion.

The Parents also argue that the record supports the IHO's determination that the proposed IEP is not appropriate to the Student's needs. The Parents argued that the School's failure to address in the IEP the Student's failing grade in English and Physical Education are indications of the inappropriateness of the IEP, as well as the Student's D+ in Social Studies. In addition, the School did not address the Student's migraine headaches, even though the Parent had advised the School of these headaches and the possibility of absences and the homebound teacher had noted the Student missed "three or four days due to migraines." The Parents acknowledge the School's evaluation report and the CCC report do acknowledge the Student's migraine headaches and the resulting absences. Notwithstanding, the Parents assert the online program would offer the flexibility to address the Student's migraine headaches.

The IEP is also deficient, the Parents assert, because of the lack of any plan for inservice training for the staff, especially in the area of ODD. Also, the homebound teacher is not a licensed special education teacher, nor is anyone in the alternative program.[6] In addition, the Parents also argue that the functional behavioral assessment (FBA) and resulting BIP are deficient. As for

[5] At oral argument, it was determined that the transportation issue was resolved between the parties. It will not be addressed further.

[6] The IHO's interim placement order specifically noted the teacher did not have to be a licensed special education teacher. The Parents did not object to this. Accordingly, to the extent they are now attempting to do so, the issue is waived. 511 IAC 7-30-4(g).

educational placement, the Parents assert that they "have a better handle on his needs than anyone" and that the Student "requires the IU online program." The information in the record regarding the online program (Petitioners' Exhibits, pp. 36-48) was not objected to by the School's counsel when the Parents' counsel used the documents in direct examination of the Student's mother. There is no ruling from the IHO that these documents would be excluded or included. The parties acted as though they had been admitted.

The Parents also assert that the Student remains a danger to himself and others. The School's assertion that the Student should be in a school setting, where he does not wish to be, will exacerbate his behavior. The Student, the Parents represent, does not benefit from socialization with other students.

The Parents also take exception to the School's argument that the Student is not making substantial progress in his homebound setting. The placement, the Parents acknowledge, was intended to be a "temporary measure" and "was never meant as a full-time program." Because it is a part-time program, it would follow that the Student would not earn as many credits as in a full-time program. The Parents also argued that the IHO's interim orders did not prevent the School from increasing his homebound coursework.

The School should be responsible for the costs of the IEE the Parents obtained due to the School's failure to timely evaluate the Student. The Parents also assert the School's evaluation was inappropriate because it lacked, in part, a "medical component."[7] The FBA was deficient, and the School did not conduct any observations of the Student in any academic setting.

The Parents also argue that the report of the neuropsychologist was properly admitted. The Parents represent that the neuropsychologist's report was received by them initially on January 22, 2007, with a final, revised version received on January 26, 2007. The Parents could not have provided the report five days before the hearing. The Parents offered to continue the hearing to provide the School with more time to review the report. It was also incumbent upon School's counsel to be more diligent in pursuing the other documents subpoenaed from the neuropsychologists. The School also could have subpoenaed the neuropsychologist to testify but did not do so.

Additional Proceedings

The entire record from the hearing was photocopied and provided to each member of the BSEA. On April 16, 2007, the Parents, by counsel, filed a pleading styled as "Motion To Vacate Order for Oral Argument." The BSEA denied the Motion by a *per curiam* Order issued that same date.

Oral argument was established for April 23, 2007, at a time and place convenient to the parties. 511 IAC 7-30-4(k). The Parents, by counsel, elected to have the oral argument open to the public. The Parents also elected to receive the written decision of the BSEA in electronic format.

[7] The Parents did not raise this as an issue at any stage during the lengthy hearing process. The Parents also did not file a Petition for Review wherein they timely raised this issue. Accordingly, the issue is waived. 511 IAC 7-30-4(g).

The parties received official Notice of Oral Argument on April 19, 2007, establishing the place, time, and date for same, along with the procedures to be followed.

On April 23, 2007, the parties appeared before the BSEA and provided oral argument and rebuttal, in accordance with the procedures detailed in 511 IAC 7-30-4 and in the Notice of Oral Argument. Following oral argument, the BSEA met to review the issues raised in the Petition for Review, the Response thereto, and the arguments presented with reference to the record as a whole. Based on the review, the BSEA now determines the following Combined Findings of Fact and Conclusions of Law.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The BSEA is a three-member administrative appellate body appointed by the State Superintendent of Public Instruction pursuant to 511 IAC 7-30-4(a). In the conduct of its review, the BSEA is to review the entire record to ensure due process hearing procedures were consistent with the requirements of 511 IAC 7-30-3. The BSEA will not disturb the Findings of Fact, Conclusions of Law, or Orders of an IHO except where the BSEA determines either a Finding of Fact, a Conclusion of Law, or Order determined, reached, or directed by the IHO is arbitrary or capricious; an abuse of discretion; contrary to law; contrary to a constitutional right, power, privilege, or immunity; in excess of the IHO's jurisdiction; reached in violation of established procedure; or unsupported by substantial evidence. 511 IAC 7-30-4(j). The School timely filed a Petition for Review. The Parents timely filed a Response to the Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).

2. **Conflict of Interest**. The School, in its Petition for Review, stated the IHO had a potential conflict of interest that should have required him to disclose same to the parties. The purported conflict of interest arose, the School argued, from the granting of charters to two virtual charter schools by the university that also employs the IHO. This, coupled with the IHO's written decision regarding the online program offered through a different university, somehow creates a conflict of interest. The IHO's employer is authorized by Indiana law to sponsor charter schools. I.C. § 20-24-1-9(2). There is no evidence presented by the School that the IHO is involved in the university's charter school decisions. There is no evidence the online program offered by the other university—itself a potential sponsor of charter schools under the same statute—is a charter school or has been chartered by the IHO's employer with the IHO's assistance. The allegation is without support and without merit. The IHO has no potential conflict of interest in this regard.

3. **Expedited Hearing**. The Parent, *pro se*, requested an expedited hearing on September 29, 2006. The issue was eventually coalesced to whether the School knew or should have known at the time the Student engaged in behavior that violated the rules of the School that the Student was a Student with a disability before the behavior that precipitated the disciplinary action occurred. After the issue for the expedited hearing had been determined at a pre-hearing conference on October 3, 2006, the Parents, through their counsel, raised additional issues. The IHO bifurcated

the proceedings, deciding to continue to conduct an expedited hearing on the issue determined and delaying the remaining issues for later proceedings. This was error on the IHO's part. Even though the parties acquiesced to this proceeding, it created an awkward and ultimately wasteful process. An expedited hearing is an "all or nothing" proposition. When the additional issues were raised after the pre-hearing conference of October 3, 2006, but on that same date, the IHO should have advised the parties that *all* issues would be part of the expedited hearing set for October 5, 2006, unless—as the IHO had been advised in his appointment letter of September 29, 2006—"the parties agree that an expedited hearing is unnecessary" and wish to proceed under the typical timelines for a due process hearing. This did not occur. There were several options available. Had the parties agreed to remove this from the expedited mode, the IHO still could have determined the Student's interim placement. The Parents could have elected to withdraw the additional issues and refile them at a later date following the conclusion of expedited administrative proceedings. The option the IHO chose was not the right one. It deprived the parties of their right to an expedited administrative appeal, even though originally his written decision of October 12, 2006, indicated such an appeal avenue was available. In reality, it wasn't available. His decision did not constitute a final—and, hence, appealable—decision. The BSEA could not have reviewed the entire record because the IHO still had the record. Had this been a final, appealable decision subject to expedited review, the later proceedings may have been negated, particularly, as will be determined *infra*, the additional hearing procedures did little to benefit the Student. The Parent obtained through the expedited hearing the relief the Parent sought: an evaluation of the Student; a determination of eligibility by the CCC on October 20, 2006; continuation of educational services; a halt to the expulsion process; and the expunging of the Student's record regarding the expulsion process. This matter could have been brought to a quicker resolution had the IHO not elected to bifurcate the process. Although it was error to do so, neither party has objected that this approach has denied them due process. Such a bifurcation is not to occur in any future hearings.

4. **Admissibility of Documents; Rulings on Hearsay**. The IHO, on numerous occasions, failed to rule on objections to the admissibility of documents or testimony. It is not helpful to indicate an objection will be taken under advisement and then never result in a ruling. A more concerted effort by the IHO to determine from the parties any objections they may have to documents at the pre-hearing setting would have greatly benefited this hearing. As it is, the parties have been left wondering whether certain documents have (or have not) been admitted into evidence. This has complicated both the parties' presentations and the BSEA's review. The IHO needs to be more forthright in obtaining parties' objections to documents and ruling on objections, including hearsay objections.

5. **Extensions of Time**. On November 22, 2006, the IHO issued an Order granting the Parents' request for a continuance. At that time, he established February 13, 2007, as the date by which the written decision would be issued. Thereafter, testimony was received on December 12 and 13, 2006, and concluded on January 30, 2007, with

about one-half day of testimony. Although some inclement weather did occur during the two weeks thereafter, the IHO failed to issue the written decision. He then contacted counsel for the parties by email on February 15, 2007, two days after the deadline, and encouraged one of them to request an extension of time. The Parent's counsel complied. The IHO issued an Order on February 20, 2007, extending the deadline to February 23, 2007. However, the IHO still did not meet this deadline. He initiated *ex parte* communications by telephoning each of the attorneys, again seeking one of them to request an extension of time. This time, the School's counsel complied. However, the IHO did not issue an Order to this effect and makes no mention in the record regarding these latter communications. As a result, the IHO's decision issued on February 26, 2007, was untimely, even given the self-serving Order of February 20, 2007. Parties may request an extension of time. 511 IAC 7-30-3(i). It is inappropriate for an IHO to contact parties to pander for an extension of time. The parties did not independently seek such extensions. Contacts by an IHO in this regard raise expectations of the parties that a favorable disposition is forthcoming. The subsequent *ex parte* contacts initiated by the IHO are particularly troublesome. This practice must cease. There was no justification for the IHO's failure to meet his original timeline. His subsequent contacts with the parties to encourage them to request extensions of time for his benefit is inappropriate.

6. **Final Appeal Right.** Although the BSEA addressed this at the outset of this appeal, the IHO's utilizing an expedited appeal statement on an already untimely written decision seriously misinformed the parties as to their actual administrative appeal rights. This is particularly so as the IHO had advised the parties on January 30, 2007, that the typical timeline for administrative appeal would be available. The IHO should have known that a hearing process that started on September 29, 2006, and did not conclude until February 26, 2007, with his granting of several extensions of time along the way, could not possibly constitute an expedited hearing subject to an expedited appeal notice. The BSEA resolved this in its Order of March 2, 2007.

7. **The Written Decision.** As will be noted below, the BSEA has determined that the IHO's written decision does contain factual and legal determinations that are not supported by the record or by law. In some instances, relevant facts are ignored while irrelevant facts are not. In others, legal standards are employed either incorrectly or not at all. There is little support for the IHO's legal conclusions and no support for his Orders.

8. A Finding of Fact must be based upon the kind of evidence that is substantial and reliable. I.C. § 4-21.5-3-27(d). A Finding of Fact "must indicate, not what someone said is true, but what is determined to be true, for that is the trier of fact's duty." Dolan v. Family and Social Services Administration, 715 N.E.2d 917, 921 (Ind. App. 1999). In this matter, the IHO often relied on statements from witnesses who had no first-hand knowledge, acknowledged they had no first-hand knowledge, but ignored witnesses who did have first-hand knowledge, both regarding the Student's educational needs and the requirements of federal and state law affecting students with disabilities. These will be addressed below.

9. Neither party objects to Findings of Fact Nos. 1-22 inclusive. Accordingly, the BSEA incorporates these Findings of Fact as fully stated herein.

10. The School objects to Findings of Fact Nos. 23-26 based on the hearsay nature of the documents from which they are derived. The Findings are based on documents from the Student's psychiatrist. While the Findings of Fact are not considered material in that their presence or absence will not alter the BSEA's decision, each Finding of Fact will be addressed. Finding of Fact No. 23 represents the psychiatrist's diagnosis. The diagnosis was not made in anticipation of testifying. The Finding will remain. Finding of Fact No. 24 is classic hearsay, but others reported the Student had been involved in infractions at school (both in the former school corporation and in this school corporation) for the past three years. The first sentence will be amended to indicate that "It was also reported that the Student had been involved in multiple infractions in the school." The remainder of the Finding of Fact will remain. Finding of Fact No. 25 is factual and will remain. Finding of Fact No. 26 relates to Finding of Fact No. 20, the latter of which has not been objected to. While of questionable relevancy, the Finding of Fact will remain.

11. Finding of Fact No. 30 is poorly written. It was not the Student who visited the psychologist "for parenting techniques." The first sentence will be rewritten: "The Student's Parents met with Dr. Reed for parenting techniques after the Student's initial visit." The remainder of this Finding of Fact is irrelevant and is stricken.

12. Finding of Fact No. 31 is correct as written but inadequate because the IHO failed to state that the psychologist later revised his diagnosis. The second sentence is rewritten as follows: "Dr. Reed has since removed the diagnosis of Oppositional Defiant Behavior and has continued to treat the Student until the present." (Tr., p. 281, indicating the revised diagnosis as of December 1, 2006).

13. Finding of Fact No. 32 misstates the record as a whole. The Finding should read: "Dr. Reed originally reported the Student is angry every day and suffers from depression." In testimony, Dr. Reed indicated that after the initial meeting, a rapport has been established. Although "lots of things are upsetting" to the Student, "he's controlling his anger really well," according to reports from both home and school. (Tr., pp. 254-255). Although the Student had been seeing Dr. Reed on a weekly basis, Dr. Reed indicated that weekly sessions may not be "completely necessary because right now he's in a good state." (Tr., p. 256). Dr. Reed also reported the Student is "much less oppositional and defiant as he has been in the past." (Tr., p. 264).

14. Finding of Fact No. 33 does represent Dr. Reed's statement. However, Dr. Reed readily acknowledged he was not familiar with the educational programs within the high school, had not discussed educational programming with any school personnel, and is not expert in making educational recommendations. He acknowledged that he received his information from the Parents and the Student. Dr. Reed is not familiar

with the federal and state requirements for educational programming for students with disabilities. Although the Finding of Fact will remain, it is accorded little weight based on the lack of first-hand and professional knowledge.

15. Finding of Fact No. 34, with regard to the Student's academic progress, is not based upon first-hand knowledge or expertise of the psychologist. The statement is hearsay. The psychologist testified that he is not an expert in such educational concepts as LRE nor is he familiar with state and federal law regarding educational services for students with disabilities. This statement is accorded little weight.

16. Findings of Fact Nos. 36-40 inclusive involve the neuropsychologist's report. Before addressing the specific objections, the BSEA is concerned about how the IHO handled the submission of this report. Although the Student was assessed in December of 2006, the neuropsychologist did not provide the report until shortly before the last day of hearing. In fact, as the Parents acknowledge, it arrived too late to meet the five-day exchange requirements, specifically for evaluations. See 511 IAC 7-30-3(l)(8). The Parents offered to have the hearing continued to provide the School with ample opportunity to review the evaluation. The neuropsychologist also was derelict in responding to the School's subpoena, but the School was likewise derelict in ensuring compliance. This all resulted in an awkward evidentiary proceeding on January 30, 2007, with an abrupt and unsatisfying ending with little or no direction. The School had at last received documents from the neuropsychologist, and tendered these after the hearing was completed. With the lack of direct testimony from the neuropsychologist (and cross-examination), a reviewer is left with considerable speculation. Nevertheless, the parties apparently acquiesced in this aspect. The post-hearing tendering of documents completely interferes with any meaningful review. The documents were not properly tendered during the hearing, there is no testimony regarding them, and there is no indication whether the IHO ever referred to them. The IHO failed to control the proceedings. Some of the effect of this unusual procedure will be addressed by the BSEA's determination that the neuropsychologist's report is an independent report obtained by the Parents at the Parents' expense. The report adds little or no value to educational programming for the Student. It is not known the extent to which the neuropsychologist interacted with the Student. As to specific objections by the School, Finding of Fact Nos. 36 is amended to indicate that the independent evaluation was not ordered by the IHO and that the Parents independently sought the evaluation. Findings of Fact Nos. 37 and 38 will remain as written. Finding of Fact No. 39 is balanced against Dr. Reed's assessment in Combined Finding of Fact and Conclusion of Law No. 13, *supra*. Dr. Reed's assessment is more credible as Dr. Reed established that he sees the Student on a regular basis and has actually interacted with the Student. Finding of Fact No. 40 lacks critical balance so as to be arbitrary. Finding of Fact No. 40 is amended to indicate the Student prefers to be schooled at home, "which is most likely related to his desire to avoid interpersonal discomfort. However, avoidance of said discomfort will not allow him the opportunity to learn from such. Ultimately, he will benefit most from a standard academic environment, with necessary academic support." (Petitioners' Ex., p. 61).

17. Finding of Fact No. 42 is amended by adding the following: "The Parents did not disagree with the School's evaluation." Finding of Fact No. 42 is further amended to indicate the Student's "perceptual reasoning score" was "average" and not "high average" as determined by the IHO. The record indicates otherwise. Finding of Fact No. 43 is correct as stated.

18. Finding of Fact No. 48 does not correctly state what the special education director stated (second sentence). She stated that she believed the student's needs could be met at the high school, and that the high school would constitute the LRE for the Student. This Finding of Fact is amended to reflect her actual statements. (Tr., pp. 46, 79).

19. Finding of Fact No. 52 flatly contradicts Finding of Fact No. 51. Finding of Fact No. 52 is stricken as it has no support in the record.

20. Finding of Fact No. 54 is not supported by the record. The CCC did discuss and document concerns raised regarding certain aspects of the Student's proposed IEP, including, *e.g.*, the Student's participation in lunch. (See Respondents' Ex., at p. 56). Parent concerns were documented and addressed. The IEP, including the BIP, as well as the CCC notes document that the needs of the Student were addressed, including any potential harmful effects.

21. Finding of Fact No. 55 is unbalanced in part and erroneous in part. The last sentence is not supported by the record and is stricken. It is not known what the IHO means by "multiple aggressive outbursts." No one in the record indicated this had occurred. The IEP does address the two major concerns for the Student: physical aggression and task completion. A specific goal was developed to address both of these components, with human resources identified and allocated to specific objectives. A cooling-off plan is included that is designed to prevent agitation from escalating. Teachers are instructed how to approach the Student. Task completion will be monitored. The IEP indicates the Parents will be contacted only where there is an emergency (the Student is engaged in severe or dangerous behavior). (See Resp. Ex. No. 16, p. 56).

22. Finding of Fact No. 56 is not supported by the record. The Student has not made "substantial academic progress in his homebound placement" compared to his previous placements in a typical high school setting. The Student earned 8 ½ credits his freshman year. At the start of his sophomore year, he became embroiled in the confrontation that resulted in these proceedings. At the time the IHO issued his written decision on February 26, 2007, the Student had earned only two (2) credits during the 2006-2007 school year. Even allowing for the reduced instructional time due to the homebound placement ordered by the IHO, the Student has not kept pace with his progress from the year before.

23. Finding of Fact No. 57 is inaccurate. The Student does utilize a computer, but this is only for a portion of his work. There is also direct instruction.

24. Finding of Fact No. 59 is misleading. The second sentence should read: "She applied the A+ program curriculum to the Student, including the requirement of writing essays, and restrictions on self-pacing."

25. Although neither party raised objections to Finding of Fact No. 60, the BSEA strikes this Finding of Fact as irrelevant. Likewise, the BSEA strikes Finding of Fact No. 62 as irrelevant.

26. The Student's IEP was properly developed in accordance with 511 IAC 7-27-6. No procedural violations occurred in the meeting of the CCC and in the development of the IEP. The IEP, including the BIP, appropriately addresses the Student's needs, particularly in light of the Student's academic ability and his intention to attend college and pursue marine biology. The CCC considered information from a variety of sources, including the Student's primary physician, psychiatrist, and psychologist. The Student's goal is to earn a high school diploma. The FBA identified physical aggression and task completion as the two major interfering agents for the Student. The BIP responds to these two major interfering agents, including the use of increased supervision through team-taught classes and direct access to affective counseling. The Parents' concern about lunchroom activity was addressed. The Student would be permitted to eat his lunch in the resource room. He would be permitted to obtain his lunch from the cafeteria before other students arrived. Should he become upset or agitated, he would be permitted a pass once a day to see the ED teacher. All teachers would approach the Student in a calm, non-confrontational manner when he is upset, angry, or agitated. The Student's special education teachers will monitor his assignment notebook and assignment completion. Parents would receive weekly reports on any missing assignments. The IEP contains goals and benchmarks related to these two major interfering agents. Core subject areas are addressed. English would be team-taught. The Student would be in a self-improvement class, with Student Resource Time (SRT) every other day on the high school's Block Eight schedule. The Student would also have an Independent Study Reading class one block every other day with the other four blocks constituting elective courses. The IEP also provides for weekly affective counseling services to assist the Student in developing and maintaining coping skills.

27. The educational evaluation conducted by the School prior to the CCC meeting of October 20, 2006, satisfies the requirements of 511 IAC 7-25-3, 511 IAC 7-25-4. The evaluation was appropriate. The Parents did not disagree with the results of the educational evaluation.

28. The IHO's Conclusion of Law No. 2 is reversed. The IEP is appropriate to meet the Student's needs. The Student is not a danger to himself or others. There is no credible testimony to this effect. While the Student may not wish to return to school, the Student's current placement is not appropriate to his needs, both academic and

behavioral. The Student is not making sufficient progress. The Student is in need of transition from his current homebound placement to a school-based program where the IEP can be implemented.

29. The IHO's Conclusion of Law No. 3 is reversed. The School did adequately consider the proposed placement's harmful effects on the Student. The IEP is reasonably calculated to provide meaningful benefit to the Student, both academically and behaviorally. The homebound placement is inappropriate.

30. The IHO's Conclusion of Law No. 4 is erroneous and not supported by the record. The purported basis for a denial of FAPE ("[f]ailure to prevent discipline of the Student for manifestations of his disabilities, including the pending expulsions [sic] proceedings, without benefit of notice and procedures contained in Article 7") has no support from any of the IHO's factual determinations. The only procedural lapse addressed by the IHO was with respect to whether the School knew or should have known that the Student was a student with disabilities at the time of the incident that gave rise to this dispute. Conclusion of Law No. 4 will now read: "The Student had attended School for a relatively short period of time; thus, the only violation of FAPE was for not timely referring the Student for a special education evaluation."

31. The IHO's Conclusion of Law No. 5 is reversed. The Parents are not entitled to reimbursement for the independent evaluation they obtained from the neuropsychologist. The evaluation was not ordered by the IHO. 511 IAC 7-25-5(g). The IHO made no findings regarding the inappropriateness of the School's educational evaluation. The Parents never disagreed with the School's educational evaluation. Parental disagreement with the School's evaluation is a condition precedent for reimbursement for an IEE. See 511 IAC 7-25-5(b). The Parents did have the right to present the evaluation as evidence at the due process hearing. 511 IAC 7-25-5(e).

32. The School is not required to pay for the services of the Student's private psychologist. The services were not requested and there is no factual predicate for these services as a means of providing the Student with a FAPE in the LRE.

ORDERS

1. The IHO's Orders Nos. 1, 3, and 4 are reversed. The BSEA, based on the foregoing, now issues the following Orders.

2. Due to the present time of the academic year, the Student's current homebound placement will continue until the end of this academic year. The Student's CCC shall meet prior to the beginning of the next academic year (2007-2008 school year) to devise a full-time placement in the school, consistent with the IEP developed on October 20, 2006. The CCC shall meet prior to the end of this academic year to develop a transitional program for the Student that will include summer enrollment on a part-time basis. These CCC meetings can be separate CCC meetings or one CCC

meeting. If it will be one CCC meeting, the CCC meeting must occur before the end of this academic year.

3. Order No. 2 is amended to read as follows: "The School shall offer 16 hours of tutoring in academic classes as compensatory educational services, as set forth in the accommodations page of the IEP."

4. The School is not required to pay for the independent evaluation obtained by the Parents. There is no support in the record that the School's educational evaluation was inappropriate or that the Parents disagreed with the School's educational evaluation.

5. The School shall not be responsible to the Parents to pay for the services of the private psychologist for visits occurring after September 19, 2006, to the present, including mileage. The IHO made no factual determinations that such services are necessary to provide a FAPE in the LRE for the Student. The services were not requested. The private psychologist is treating the Student for a medical condition. Medical services are not related services, except where necessary for diagnostic reasons. 511 IAC 7-28-1(a)(4), (e). The private psychologist's services do not constitute a "related service" under 511 IAC 7-17-62. Notwithstanding the above, the Parents are not required to reimburse the School any payments already made by the School pursuant to the IHO's Order.

6. Any issues not otherwise addressed above is deemed denied or overruled, as appropriate.

DATE: May 4, 2007

/s/ Cynthia Dewes, Chair
Board of Special Education Appeals

APPEAL RIGHT

Any party aggrieved by the decision of the Board of Special Education Appeals shall have thirty (30) calendar days from receipt of this decision to seek judicial review in a civil court with jurisdiction, as provided by 511 IAC 7-30-4(n) and I.C. § 4-21.5-5-5.